property and it follows that the property cannot be taken from them without all of them signing the memorandum of transfer. That was a point which worried me to a certain extent, because, if the property could be transferred without the consent of any of the members of the partnership, creditors of the company could have come in between the partners and their hold on this piece of land, but counsel conceded that this could not happen and consequently I do not think the judge's omission to deal with this point is material. I agree that the appeal should be dismissed.

Tan Ah Tah F.J.: I also agree that this appeal should be dismissed. I wish to add that section 14 of the Partnership Ordinance cannot be construed, as counsel for the appellants attempted to do, as being applicable only to partnerships entered into for a fixed term.

Wylie C.J. (Borneo): The appeal is dismissed with costs.

Deposit to be paid to respondents or their advocates.

Appeal dismissed.

SAIGAL v. SAIGAL

[O.C.J. (Gill J.) June 20, 1964]

[K.L. — Divorce Suit No. 14 of 1963]

Husband and Wife — Divorce — Cruelty — Desertion — Condonation of cruelty by resumption of cohabitation — Revival by continued desertion.

The husband petitioned for divorce on the grounds of the wife's cruelty and desertion. It was found on the facts that the wife had been guilty of acts of cruelty to the husband but that subsequent thereto the husband had sexual intercourse with his wife. The wife deserted the husband on June 17, 1960, but between the period February 1962 to February 1963 there were acts of sexual intercourse between them. The wife continued to desert the husband after March, 1963.

Held: (1) by reason of the resumption of normal marital relations between the parties each act of cruelty alleged by the husband was condoned but it was revived by each subsequent act of cruelty;

(2) cruelty which has been condoned may be revived by subsequent desertion and therefore in this case the wife's cruelty was revived by her continued desertion.

Cases referred to:—

(1) *Perry* v. *Perry* [1952] P. 203.

(2) *Pizey* v. *Pizey and Stephenson* [1961] P. 101.

(3) *Benton* v. *Benton* [1958] P. 12.

(4) *Willan* v. *Willan* [1960] 2 All E.R. 463.

(5) *Beard* v. *Beard* [1946] P. 8.

SUIT FOR DIVORCE.

N. A. Marjoribanks for the petitioner.

A. Jayadeva for the respondent.

Cur. Adv. Vult.

Gill J.: This is a husband's petition for divorce on the grounds of his wife's cruelty and desertion. Both cruelty and desertion are denied by the wife who in turn charges the husband with cruelty and constructive desertion in that she was compelled by the petitioner's cruelty and conduct and the conduct of his parents and relatives to leave the matrimonial home, although she is not asking for any relief on those grounds.

The parties were married at the Marriage Registry in the District of Hendon in the County of Middlesex, England on 12th December, 1956, the petitioner being then 26 years old and the respondent 29. While in England they lived and cohabited first at 62 Ashbourne Avenue, London, N.W.11 and then at Fawlay Road, West Hampstead, London. Their first child, a daughter named Aruna, was born in London on 24th November, 1957.

Upon their return to Malaya the parties lived and cohabited in the husband's father's house at No. 10 Store Road, Kuala Lumpur from July 1958 and their second child, another daughter named Pushpa, was born on 2nd December, 1958. Soon after the birth of her second child the wife, with the husband's consent, went to live in Sungai Patani with her brother, who is a doctor in Government service, in order to recuperate her health. She returned to Kuala Lumpur in July 1959 and in September 1959 the parties moved into the husband's Railway Quarters at No. 1, Salak South.

In February 1960 the wife with her husband's agreement again went to live with her doctor brother in Sungai Patani, this time to see her mother and elder sister who had come from India on a visit. She was then about 7 months pregnant. In April 1960 she wrote to her husband to say that she wished to return to Kuala Lumpur for her confinement. The husband replied requesting her not to return as he was then appearing for an examination. He sent her a sum of $540 and she had her confinement in Sungai Patani where their third child, again a daughter named Sushita, was born on 23rd April, 1960.

At about this time the husband's father was seriously ill in Bungsar Hospital and he died on 8th June, 1960. On the same date the wife had sent a prepaid reply telegram saying "REPLY ONLY YES OR NO BEFORE 10 P.M. 8TH JUNE WHETHER YOU WANT ME BACK OR NOT DONT TELEPHONE".

The husband sent a reply telegram to say that his father had died. As a result of this telegram the wife came down to Kuala Lumpur with her children and her mother on 13th June, 1960. On the following day she left the house with her

mother and the youngest child. On the third day she went back to the house and in her husband's absence took away her other children and all her belongings and returned to Sungai Patani with her brother who had come down to Kuala Lumpur to fetch her.

It is common ground that since leaving her matrimonial home on 17th June, 1960 the wife has not resumed cohabitation with her husband. In January 1961 she got a job as a Staff Nurse at the Rural Health Training Centre, Jitra. The husband came to know about it in September or October, 1961. From February 1962 to February 1963 he visited her at Jitra on several occasions with a view to bringing about a reconciliation. In August 1962 the wife came to Kuala Lumpur for a course at the T.B. Clinic. Her intention while in Kuala Lumpur was to stay in a hostel, but on her husband's persuasion stayed with him. In December 1962 she spent one night with her husband on her way to Kuantan to spend Christmas with her doctor brother, who was then stationed at Kuantan. The husband brought her from Kuantan to stay with him for a few days and then took her back to Jitra.

On most of his visits to Jitra and whilst she stayed with him in Kuala Lumpur during this period the husband had sexual intercourse with her. However, all his efforts at reconciliation failed. His last visit to Jitra was in February 1963. On 13th March, 1963 she wrote him a letter asking him not to press her any further regarding her living with him. On 1st July, 1963 the husband's solicitors wrote a letter to the wife giving her notice of intended divorce proceedings, following which the present proceedings were commenced on 6th August, 1963.

In view of the allegations of cruelty on both sides, some of which consist of injurious reproaches, complaints, accusations and taunts, it is necessary to consider the whole of the matrimonial relations between the parties which were related at the trial lasting several days.

The parties met each other in 1952 when they were both students at the University of Delhi in India. They fell in love and in 1953 the petitioner proposed marriage. The respondent was then a married woman, but in the same year she obtained a divorce from her first husband and then agreed to marry the petitioner. In 1954 the petitioner, after having obtained a degree in economics from the University of Delhi, returned to Malaya and got a job as a traffic apprentice in the Malayan Railway. After a year's training locally he was sent to England for further training for two years. On his way to England he stopped in Delhi for three weeks to see the respondent and asked her to join him in England in 1955. He gave her the money for her passage to England and the respondent agreed to join him on completing her course at the University in Nursing in 1956. She arrived in London by air on 9th December, 1956 and the marriage took place on 12th December.

The petitioner is a Punjabi Hindu and the respondent a Tamil Christian. He comes of a humble home, his father having worked as a caretaker of the Kuala Lumpur Town Hall until about a year before his death in June 1960, whereas she comes of a family of doctors. The petitioner has stated that before the respondent left Delhi to join him she wrote him several letters about religion and wanted him to become a Christian. After some correspondences he informed her that he would become a Christian after the deaths of his parents. Two letters written by the petitioner from London quite clearly indicate that he was madly in love with the respondent and was very anxious that she should join him as soon as possible. In his second letter of 22nd October, 1956 he was at pains to point out that it was only a matter of a few years before he would become a Christian. He had informed his parents that he was intending to marry a Christian woman and they had raised no objection, but, being their only son, he did not want to hurt their feelings by changing his religion, particularly as they had sacrificed so much for him. I mention these differences in race, religion and social status between the parties because to my mind they were largely responsible for the eventual break up of the marriage.

The marriage was doomed to failure from the very beginning because trouble started on the very first night of the marriage. There was a small wedding party at their house at which admittedly some liquor was consumed. After the departure of the guests at about 9.30 p.m. the respondent accused the petitioner of being a drunkard and ordered him out of the bedroom. The petitioner was completely shocked by the conduct of his wife. He pleaded with her and asked her not to get angry merely because he had had some drinks with friends, but she was adamant and again asked him to leave the room. He took a blanket and a pillow and slept in the lounge. The petitioner says that when his guests left he was not drunk but was in a happy mood. The respondent's story is that her husband was drunk and staggered into her bedroom, although she goes on to say that she was also angry with him because of some remarks which he had made during the party.

Of the two versions as to what took place on the wedding night, I accept that of the husband as being substantially true because I formed the impression that he was a trustworthy and truthful witness. The evidence in this case shows that he is fond of liquor and that he sometimes drank

in excess to drown his sorrow, but apart from what the wife has said, there is not the slightest evidence that he was ever found drunk. If he started drinking in excess, it was only after his return to Malaya and even so whenever he was unhappy because of his wife's conduct. It was cruel on the part of the wife to order her husband out of the bedroom on their wedding night and make him sleep in the lounge in the cold, although this single act of cruelty would be no justification for dissolving the marriage.

On the day after the wedding night the parties did not speak to each other in the morning, but got reconciled in the evening. The husband says that as the days of their marriage went on the respondent would find any excuse to pick up quarrels and fights and ask him to get out of their bed. Instead of quarrelling with her he would take a blanket and a pillow and sleep on the carpet on the floor. Seeing him lie on the floor would not make her happy. She would take the blanket and pillow off and sometimes go a little further by throwing shoes at him. She would often make scenes at the slightest provocation and would not talk to him for two or three days. This would cause him pain and he would eventually plead with her. He never quarrelled with her, but she nagged, scolded and bullied him. When she became very angry, she would start murmuring, waving her hands and sometimes become hysterical and fall on the ground. He often came home late because he had to attend evening classes, and sometimes on his way back he would have a glass of beer with his lecturers or fellow students. His wife would accuse him of being drunk again and pick up quarrels.

The husband's story about the matrimonial relations during this period is borne out by the evidence of Mr. Sanderson (P.W.3), the Deputy General Manager of Malayan Railway, who met the parties during his long leave in London from April to August, 1957. His evidence, briefly, is that he remembers thinking at that time that there was a feeling of strain between husband and wife. He also recalls thinking that the petitioner was drinking more than when he left Malaya and that the only conclusion he thought of at that time was that the petitioner was unhappy in his domestic life. This witness has known the petitioner from the time he was employed by the Malayan Railway, and according to him the petitioner is not a man of violent temper but precisely the opposite. He goes on to say that he often wished that the petitioner showed some spark. Mr. Sanderson is an independent witness and I place very great reliance on his evidence as to the character of the petitioner. In view of his evidence and some other evidence in this case I formed the impression that the petitioner allowed himself to be bullied by the respondent and that the respondent took advantage of his weakness and good nature. To my mind, the wife set out to bend the husband's will to hers and she embarked upon that course from the very beginning. Indeed the wife has admitted that she wanted to change him from the beginning. She wanted him to become a Christian and she did not completely deny that she wanted him to live the life she wished.

I now come to some of the other alleged incidents of cruelty on the part of the wife during the period that the parties cohabited in England. The first of these incidents took place when the petitioner came home late one night, whereupon there was a quarrel and he was asked to get out of the house. He picked up a few clothes and some books and walked from Westhampstead to Nottinghill Gate to the flat of a colleague of his named Gabriel. He stayed with Gabriel for two or three days after which his wife telephoned to say she was sorry and he then went home. The wife's version of this incident is that when her husband returned home late she asked him why he was late, and he replied that he had left a party to come home early. She then said, "If you were having such a good time at the party, why don't you go back?", whereupon he left the house. The evidence of Mr. Gabriel (P.W.8) is that the petitioner came to his house at about 2 a.m., looking tired and worried and lacking sleep. The petitioner told him that he had had a quarrel with his wife and that she had asked him to leave her room. The petitioner further told him that he could not get any transport and had to walk all the way to his house. Here again, on considering the evidence of these three witnesses, I am satisfied beyond reasonable doubt that the respondent drove the petitioner out of the house. I mention once again that I prefer the evidence of the petitioner to that of the respondent.

On another occasion after a quarrel the respondent turned the petitioner out of the house, throwing his overcoat through the window. He spent the night at West Hampstead Tube Station and in the morning went to the house of Dr. Keshminder Singh (P.W.6). Dr. Keshminder Singh says in his evidence that the petitioner came to his flat at 6 o'clock in the morning, looking dirty and unkempt. The petitioner was crying and his overcoat had no buttons. The petitioner told this witness that he had arrived home a little late on the previous evening because he had to go to the library and that on his arrival his wife started a quarrel, during which she became quite vicious. According to this witness, the petitioner mentioned that the respondent had thrown his shoes and books, had assaulted him and pushed him out of his flat. The petitioner had gone back to his flat, but his wife would not let him in and that finally she had thrown his

overcoat and told him not to return. The petitioner further told him that he had spent the night at an underground tube station. All this is denied by the wife, but she does not go to the the extent of suggesting that Dr. Keshminder Singh was giving false evidence, although she said that the petitioner had invented the whole incident and mentioned it to Dr. Keshminder Singh. I do not believe the petitioner has invented this incident and I have no reason whatsoever to doubt the evidence of Dr. Keshminder Singh.

The petitioner says that in May 1958 the respondent tore up some of his notes of study which he had made during the course of his preparations for an examination and wrote filthy words on them. This again is denied by the wife, but Gabriel has given evidence to say that he saw the torn notes and that in fact they were with him for some time although he did not bring them back to Malaya, his explanation being that they were probably mislaid when he was doing his packing. This incident in itself may sound trivial, but it does indicate the viciousness of the respondent. It cannot be denied that the destruction of his notes must have caused the petitioner a good deal of worry and anxiety because he was then about to sit for an examination.

On the same occasion the respondent snatched away the petitioner's glasses and stepped on them causing them to break. The petitioner telephoned Dr. Keshminder Singh about his broken glasses and got an appointment in order to get a new pair of glasses. Dr. Keshminder Singh has corroborated the petitioner's story about the torn notes and about the broken glasses. Gabriel also says that the petitioner showed him some broken pieces of glass and said that his wife had stepped on his spectacles. Here again I accept the petitioner's story.

The incidents which I have dealt with took place whilst the parties were in England. This period may be said to be their first period of cohabitation. Some of these incidents may be considered to be of a trivial nature, but to my mind they go to show that the respondent is a woman of ungoverned temper. The witnesses who have related what they know of the relationship between the petitioner and the respondent in London tend to confirm the respondent's conduct. Taking all these acts together, I have no hesitation in saying that the respondent was cruel to the petitioner. The effects of these acts of cruelty are summed up by Mr. Sanderson when he says that the petitioner when he returned from England in May 1958 was not the alert, keen and confident young man that he was when he went to England.

Although the conduct of the respondent must have caused the petitioner a great deal of unhappiness, worry and anxiety, no medical evidence has been produced to show that his health was affected to such an extent that he would have been entitled to a decree on the ground of cruelty. In any event divorce does not appear to have been in the contemplation of either of the parties while they were in England.

The parties left London in May 1958. The respondent stayed on for some time in Madras and joined her husband in July 1958. As the petitioner had been unable to pass his examinations in England, he was demoted to the position of a clerk in the Malayan Railway. He was not provided with quarters and obviously his salary as a clerk was not very much. He therefore had to stay with his wife in the house of his father at 9 Store Road, Kuala Lumpur. This presumably was a house provided by the Municipality for the petitioner's father as caretaker, and admittedly it was a very small house. The respondent quite naturally expected her husband to provide her with better living accommodation, but he was unable to afford it. They lived in this house until December 1958 when after the birth of their second child the respondent of her own wish and with the consent of her husband went to live with her doctor brother in Sungai Patani. The petitioner's evidence is that a few days after her arrival from India the respondent stopped talking to his parents except for intermittent periods here and there and remained in her bedroom. By this time their normal pattern of life in England had started again and there were quarrels and bickerings. Towards the end of 1958 the respondent left the house without informing anyone and stayed away at the Majestic Hotel, Kuala Lumpur for one day, thereby causing the petitioner considerable anxiety and worry.

The petitioner has related an incident shortly before their second child was due to be born. The respondent suddenly lost her temper and said she was leaving the house. The petitioner tried to stop her, but she went out of the house holding a bag in one hand and their first child in the other. Seeing the child crying, he took her away from the respondent and put her in the cot. As he was in the house, he heard a sound. On going out he saw his wife lying on the ground. She was hysterical and uncontrollable, moving and murmuring something. He pulled her inside the house and tried to control her. When she started complaining of labour pains, an ambulance was sent for and she was taken to Bungsar Hospital where she gave birth to the second baby on the following day. During this second period of their cohabitation, apart from the usual quarrels and bickerings, no serious incident appears to have taken place. As I have stated

above, soon after the birth of her second child the respondent went to live in Sungai Patani.

The petitioner visited the respondent at Sungai Patani on three occasions. On his third visit in March 1959 he fell ill. The respondent then told the petitioner that he must become a Christian, and she became very angry when he refused. She then said that she was going to have her second child baptized as a Christian in April and that he must attend the ceremony. He did not agree to this. She also divulged that the first child had been baptized in Madras. The petitioner's refusal to become a Christian and to attend the baptism ceremony of his second child started a big quarrel in consequence of which the petitioner picked up his bag and left. As he was leaving the house, the respondent pushed him out and locked the door, saying, "Don't come back here again."

On 30th March, 1959 the respondent wrote a letter to the petitioner, who replied by his letter of 6th April, 1959. In her letter she had said that she would return to Kuala Lumpur on 14th April, 1959, but she did not do so. She then wrote to the respondent a letter dated 11th April, 1959 in which she stated, *inter alia*, "If you choose not to convert — then my decision remains unchanged. But if you decide not to break your promise, then I will gladly forget everything and come to you." The letter indicates quite clearly that the thought of having to live with a husband who was not a Christian was beginning to be distasteful to her. She has stated in her evidence that at that time as far as she was concerned she was going to come down to Kuala Lumpur, collect her things and leave her husband. After the exchange of letters the petitioner did not visit the respondent at Sungai Patani since she had told him not to go back. Some time afterwards the respondent's elder brother, Dr. V. S. Edwards, visited Kuala Lumpur two or three times and eventually persuaded him to bring his wife back.

The petitioner went to Sungai Patani in July 1959 and brought his wife and children back to 9 Store Road, Kuala Lumpur. The petitioner's father and mother came out to meet the respondent and the children, but she brushed them aside and went in. I pause here to observe that quite clearly the respondent had been persuaded by her brother to return to Kuala Lumpur, but that she herself was not happy to return. The petitioner went out that afternoon with a friend of his named Peter Alkantra to buy an electric kettle and a fan in order to make the respondent as comfortable as he could. When he returned to the house, he found his wife in a bad temper. She was lying on the floor and making movements with her hands and legs.

A few weeks after the return of the respondent from Sungai Patani a very serious quarrel arose between the parties. The petitioner's version of this was as follows. He took his wife for a walk along Brockman Road. She expressed a desire for a bus ride and a glass of coconut water. Unfortunately he had no money on him at that time and he told her so. Upon this she became very angry. They returned home and before going into the house sat by the side of the Municipality Sewerage Office. There the respondent started quarrelling and becoming more and more angry. He tried to plead with her, asking her not to be angry over a small matter, but she started spitting on him and using abusive language. He told her to stop it, but she went on. By this time he lost his temper. She started pulling his hair and tried to hit him. He caught hold of her hair and gave her a few slaps. As they were fighting, they moved towards the house. She took off his glasses and threw them on the roof of her house. She then went into the kitchen and came out holding a kitchen knife and coming towards him. Most of the neighbours gathered round and somebody took the knife from her.

The wife's story is that there was a quarrel because she asked her husband to buy her coconut water and he said that he had no money. The quarrel took place after they had returned from the walk and when they were sitting outside the house. He was in a bad temper and on seeing him in that condition she walked towards the house. The petitioner followed her and started beating her. Some of the neighbours who noticed this came running and tried to pull him away. She thinks that she was trying to ward off his blows when she must have knocked off his glasses. She felt so small and humiliated by this incident that at that time her only desire was to be dead. So she went into the kitchen and got hold of the kitchen knife in order to kill herself, but someone grabbed the knife away from her.

Jagdish Lal (P.W.5), a nephew of the petitioner, has given evidence to corroborate the petitioner's story about the respondent throwing his glasses and flourishing a knife at him, although in some minor particulars his story differs from that of the petitioner. Fakirchand (P.W.11), a retired Deputy Superintendent of Police and a brother-in-law of the petitioner, has stated in his evidence that on the evening in question he and his wife took the petitioner's father and mother for a joy ride in his car and that on their return to the house he saw the petitioner and the respondent talking loudly and pulling each other. He saw the respondent take off the spectacles of the petitioner and throw them on the roof of a house nearby. She then ran

into the house and almost immediately came out holding a kitchen knife in her right hand. She went up to the petitioner with her right hand raised, but someone who was standing very close to them took away the knife. Quite a number of people were present at the scene and he took down the spectacles with a pole and handed them to the petitioner.

Notwithstanding the discrepancies in the evidence of the various witnesses as regards this incident, I find that the petitioner's story as to what happened in the light of all the other evidence is substantially correct. I find it incredible that the petitioner, having given the respondent a cause to complain by not buying coconut water for her, would assault her for no reason. I am satisfied that the quarrel was started by the respondent because of her bad temper. The petitioner has not attempted to deny that on this one occasion he, too, lost his temper. Of all the incidents of cruelty that have been alleged against the respondent, I consider this one the most serious.

In September 1959 the petitioner got Railway quarters at No. 1, Salak South, and the whole family moved in. According to the petitioner, his wife's behaviour did not change although they had now moved into a larger house. He says that in December 1959 the respondent assaulted his mother and sister and abused him. He, of course, did not see the assault, but he says that as a result of a telephone call from the respondent he went home and found that his mother's and sister's clothes were torn and that both of them were weeping. This in itself was not a serious matter and I do not consider it as an act of cruelty to the petitioner. I mention this in passing so as to lead to the next phase in the lives of the married couple.

As I have stated above, the respondent stayed with her brother in Sungai Patani from February to 12th June, 1960 when she sent a telegram asking her husband whether he wanted her back or not. It is not clear why this telegram has been introduced into the evidence, nor am I quite clear as to the reason which prompted the sending of it. If it has been produced to show that the petitioner had no intention of recalling his wife from Sungai Patani, then I must say that there is no evidence whatsoever to suggest that the petitioner had no intention of wanting his wife back. He had written a letter dated 21st May, 1960, mentioning his financial position on account of the illness of his father who had been in hospital for about 40 days. He complained in this letter that his wife had not had the decency or the courtesy to inquire after his father. Indeed this letter went on to narrate the cruelties and miseries which his wife had brought upon him, but there was not the slightest hint that he was not going to take her back. He had at that stage taken his final examination which he ultimately passed. Having been reduced to the position of a clerk, he was on the point then of moving up in life. If he was unable to go to see his wife and children, it was only because his father was seriously ill.

As a result of the petitioner's telegram the respondent, her children and her mother came down to Kuala Lumpur on 13th June. It is not seriously denied that both the respondent and her mother were wearing coloured saris and that on arriving at the house they walked into the bedroom without offering a word of condolence to the petitioner's mother who was sitting in a corner of the hall where a photograph of her late husband was placed. Nothing particular happened that night. The petitioner slept on the floor near his father's photograph as is customary amongst Hindus for 17 days after a death in the family. On the following day the respondent wanted to fry some eggs in the kitchen, but she was not allowed to do so. It was explained to her that, according to Hindu custom, no meat or eggs are cooked in the house during the mourning period. This appears to have led to some quarrels with the people in the house.

The petitioner says that the respondent did not say a word about his father's death. Because of what had been going on in the house, he asked his brother-in-law Fakirchand as an elder of his family to speak to the respondent's mother to advise her daughter to live amicably. He was present during the conversation with the respondent's mother. That evening when the petitioner came back from his office the respondent had an argument with him. He pleaded with her and said, "This is no occasion to quarrel over anything. You should stand by my side and help me on this sad occasion." The reply by the respondent to this, according to the petitioner, was, "I hate Hindus because they burn bodies. I suppose you will burn me when I die. I have no place in this house and I am going away." The petitioner pleaded with her to stay, but his persuasions had no effect. She went out and brought a taxi and, taking a small bag, left the house with her mother and her youngest child, leaving the two elder children behind. On the third day when he was not at home, the respondent took the other children and all her other belongings from the house.

The respondent's story about this visit is that when she arrived at the house her husband looked annoyed and demanded to know how she had come. The petitioner's mother did not speak to her. There was quite a crowd in the hall and they all looked at her in such a way that she understood that she was most unwelcome. She and her children were not given any food and that

night they all slept without having had any dinner. The next day when she went into the kitchen to get some food, some women snatched the plate and spoon from her hand and told her not to enter the kitchen. The petitioner's sister, Mrs. Fakirchand, followed her into the room and told her that she was not to touch anything. So she went to a Chinese shop and bought some food for herself and for the children and for her mother. That evening her husband spoke to her and said that his brother-in-law, Fakirchand, wanted to speak to her and to her mother. According to her, Fakirchand levelled all sorts of accusations against her and told her that she must go away. Her mother said that she would like to consult the respondent's brother on this matter, but the petitioner said emphatically that he was not going to see her brother.

I do not consider it necessary to go into further and greater details about her story. Suffice it to say that, according to her, she was ordered out of the house. Fakirchand has given evidence denying that he said anything other than advising the respondent to live amicably with the petitioner. I am not forgetting that he is a relation of the petitioner and must necessarily be biased in his favour, but in my opinion there was very little exaggeration in his evidence in relation to what took place. I have given very careful consideration to the evidence on both sides as to what took place on this last occasion and I am compelled to say that I find the respondent's evidence to be utterly unworthy of credit. I cannot believe it of the petitioner, judging from the way he allowed himself to be dominated by his wife, that he had it in him to order his wife out of the house. The truth would appear to be that the respondent did not find the atmosphere in the house of death very congenial. The Hindu customs which were being observed in connection with the mourning period were hateful to her and she wanted to get out of the house as quickly as she could. She sent for her brother and poisoned his mind against seeing the petitioner before taking them back to Sungai Patani. I heard the evidence of her brother in court and I was most impressed with the truthfulness of his entire story, but I am satisfied that the respondent manoeuvred her brother into a position where he was led to believe that no useful purpose would be served in his asking the petitioner for an explanation as to why he was turning his wife out of the house. In view of the very serious attempts which the petitioner subsequently made to bring about a reconciliation between himself and his wife, I cannot believe that he had ceased to love his wife and wanted no more of her. That he still loved his wife after she had left him is borne out by the evidence of Dr. Jaswant Singh Sodhy. It is true that Dr. Sodhy is a member of the same race as the petitioner, but he has not gone out of his way to give any evidence to the detriment of the respondent. He says that he found the petitioner living in a state of anxiety, ascertained from him the cause of such anxiety and then advised him to go all out to win back his wife.

As I have said, some of the alleged acts of cruelty were trivial in nature. Others, notwithstanding their gravity, may not by themselves, taken separately, amount to legal cruelty, but I have no doubt that the cumulative effect of the respondent's conduct brought misery upon the petitioner. That these acts of cruelty caused ill health to the petitioner is borne out by the evidence of Mr. Sanderson that the petitioner used to have far too much sick leave on account of his headaches. There is also the evidence of Dr. Visvanathan and Dr. Khaira, both of whom have testified that the petitioner was suffering from perpetual headaches brought about by a state of stress and anxiety. It is true that each act of cruelty was condoned by the petitioner, but in law these acts of cruelty were revived by the respondent's desertion on 17th June, 1960. Upon careful examination and consideration of the whole of the evidence in this case I am satisfied beyond reasonable doubt that the respondent has been guilty of cruelty and that she deserted the petitioner on 17th June, 1960. I also find that there was no constructive desertion on the part of the petitioner because I am satisfied beyond reasonable doubt that the respondent left of her own free will and not because she was driven out of the house.

Before I come to deal with the events which took place after the desertion, it is necessary for me to deal with the allegations of cruelty made by the respondent against the petitioner. Some of them arose out of the same incidents as the incidents on which the petitioner has founded his cruelty against his wife. As far as those incidents are concerned, I have already made a finding that the husband was not to blame.

The main charge of cruelty against the husband is one of drunkenness. I do not wish to go over the ground which I have covered. The petitioner has freely and frankly admitted that he is fond of alcohol but that he has never taken liquor in excess except when he was drowning his sorrows and that even on those occasions he was never boisterous or aggressive. I accept his evidence as regards the so-called drunkenness. Several witnesses have given evidence about the drinking habits of the petitioner, but none of them has said that he saw the petitioner drunk or boisterous or aggressive on any occasion. I am satisfied that the petitioner's drinking habits had nothing whatever to do with the break up of the marriage. Drunkenness, *per se*, is not cruelty, although persistency in drunkenness after

warnings that such conduct is injuring the other spouse's health, may amount to cruelty. No evidence has been produced to show that the husband's drinking injured the wife's health. It is true that a spouse is entitled to the protection of the court against acts of cruelty by the other spouse when suffering from the effects of drink, but here again there is no evidence that the husband ever beat up his wife after drinking. All that the wife has said is that her husband was aggressive whenever he had had drinks, and she has given no evidence of his having ever laid hands on her when he had had alcoholic drinks. On the wedding night when the husband is alleged to have been drunk, far from beating up his wife, he meekly retired into the lounge to spend the night in the cold.

There are two or three other acts of cruelty alleged by the wife against the husband. Firstly, she accuses him of having beaten her up after the birth of her first child when she was two months pregnant. She says this beating caused a miscarriage. This has been denied by the husband, and, as I have said earlier on, I prefer his evidence to that of his wife. The wife admits that there was no reason for the husband to beat her on this occasion. I am therefore satisfied that her miscarriage was not the result of any beating up.

The next act of cruelty alleged against the husband is the beating up of his wife a day or two before she gave birth to the second child. Here again I am satisfied that there was no beating up. If the husband had really beaten her, it is extremely unlikely that he would have called the respondent's cousin named N. D. H. Paul (D.W.2) to assist him to take the respondent to hospital. Indeed she made no complaint to Paul. Her doctor brother came to see her in the hospital soon after she gave birth to her child and no complaint was made to him about any beating.

I have already dealt with the quarrel which the parties had about six weeks after the respondent returned from Sungai Patani in July 1959. As I have stated before the guilty party on that occasion was the wife. She was justified in being angry with her husband for not buying her coconut water, but she had no justification for threatening her husband with a knife. The husband has frankly admitted that he slapped her two or three times on this occasion, but that was under provocation.

The last act of cruelty alleged against the husband is that when they were living in the Salak South house he kicked his wife in the bladder. A doctor was called on the occasion to treat her. She made no complaint to him about the assault upon her by her husband and he has not been called to give evidence as to the nature of the injury she had. Thus, taking into consideration the entire matrimonial relationship between the parties, I am satisfied that the husband has not been guilty of cruelty towards his wife.

I have already said that the wife deserted the husband on 17th June, 1960 and that all efforts on the part of the husband from February 1962 to February 1963 to persuade her to return to him failed. She has frankly admitted that her husband always wanted her to live with him at Kuala Lumpur, but that she did not want to live with him and was quite happy to see him at Jitra. She goes on to say that she became reconciled with him about June 1962 but that she did not want to go back to live with him because she did not wish the old mistakes to be repeated and because he had said that his mother and sister would be living with him. It is to be observed that in none of her letters did she mention anything about her not wanting to stay with her husband so long as his mother and sister stayed with him. The truth is, and she was forced to admit it, that she was quite content to remain working at Jitra and was quite happy to see him whenever he could visit her. On 13th March, 1963 she wrote a letter to the petitioner asking him not to press her any further regarding her living with him. She had thus made it quite clear to him that she had no intention of going back to him.

Coming now to the legal aspects of the case, the first question which I have to decide is whether sexual intercourse by the petitioner with the respondent during the period February 1962 to February 1963 put an end to the wife's desertion so as to bar him from obtaining a decree on that ground. The contention of Mr. Marjoribanks on behalf of the petitioner is that sexual intercourse did not amount to condonation of desertion. In this connection he has cited the case of *Perry* v. *Perry*.[1] In that case a wife deserted her husband in July 1944 and went to live with her mother. The husband visited her from time to time and two or three isolated acts of sexual intercourse took place between the spouses from December 1949 to March 1950, as a result of which a child was born. The *animus deserendi* of the wife never changed and on May 15, 1951 the husband petitioned for divorce on the ground of desertion. The commissioner dismissed the petition on the ground that the acts of sexual intercourse had put an end to the period of desertion and the wife's earlier desertion could not be revived by her continuing desertion after March 1950. On appeal to the Court of Appeal it was held that desertion as a ground for divorce differs from the other statutory grounds of adultery and cruelty, in that the offence founding the cause of action is not complete until the action

is constituted, i.e., the petition is presented. The conception of condonation either in strictness or by analogy has no application to the continuing matrimonial offence of desertion as defined in section 1(1)(b) of the Matrimonial Causes Act, 1950. It was further held that a resumption of cohabitation in the sense of the setting up of a matrimonial home together, accompanied by a common intention on the part of both spouses to do so, is necessary to end or interrupt desertion. Accordingly, sexual intercourse between a deserted and a deserting spouse unaccompanied by the setting up of any such home or by any intention to do so cannot end or interrupt the state of desertion whether the deserter is the husband or the wife and whether or not the intercourse leads to the birth of a child.

It is to be observed that the facts relating to sexual intercourse after desertion in the present case are not very dissimilar from the facts in *Perry* v. *Perry,* but Mr. Jeyadeva on behalf of the respondent has referred me to the case of *Pizey* v. *Pizey and Stephenson* [2] in support of his contention that desertion was terminated by the husband's course of conduct consisting in regular visits to and intercourse with the wife so that the separation thereafter became consensual. To my mind the case of *Pizey* v. *Pizey and Stephenson* is clearly distinguishable from the present case which, as I have said, is almost on all fours with *Perry* v. *Perry.* In *Pizey* v. *Pizey and Stephenson* the wife's desertion commenced with her confession of adultery and her leaving the matrimonial home after such confession. The Court of Appeal therefore held that the acts of sexual intercourse by the husband whereby the adultery was condoned must be regarded as having at one and the same time removed the cause on which the desertion depended. The Court of Appeal further held that, desertion having been terminated by the husband's course of conduct consisting in regular visits to and intercourse with the wife extending over a period of about two years, the separation between the spouses thereafter became consensual. It was for those reasons that the petition in that case was dismissed. The desertion in the present case was not founded on adultery and there is no evidence from which it is clear or from which an inference can be drawn that the separation between the parties ever became consensual. The wife's evidence quite clearly is that her husband wanted her to stay with him, but that she did not want to. For these reasons *Pizey* v. *Pizey and Stephenson* has no application to this case. Quite clearly the principles of *Perry* v. *Perry* apply and the husband therefore is entitled to a decree on the ground of his wife's desertion.

The next question I have to decide is whether cruelty has been condoned by reason of the acts of sexual intercourse during the period of attempted reconciliation. *Rayden on Divorce,* 8th Edition, at page 235 says that

> "as far as sexual intercourse is concerned, the same consideration applies, where men are concerned, in condonation of cruelty as in condonation of adultery; so that a single act of voluntary intercourse, not induced by fraud, condones a wife's cruelty".

Thus, in *Benton* v. *Benton* [3] evidence of a single voluntary act of sexual intercourse on the part of the husband was held to be conclusive against him as establishing condonation of his wife's cruelty. In *Willan* v. *Willan* [4] a wife was guilty of persistent assaults on and violence to her husband and in particular she frequently demanded sexual intercourse when he did not wish to have it and pulled his hair, caught hold of him by the ears and shook his head violently until he was induced to comply as the only means of getting any rest. Following on a night in which this happened and in which the husband had intercourse with the wife in the early hours of the morning, the husband left the wife and subsequently brought proceedings for divorce. It was held that the wife's cruelty had been condoned by the husband by the last act of intercourse, which was a distinct act from the wife's preceding acts of cruelty and which in a man must be deemed to be his voluntary act unless induced by fraud.

The position in this case therefore was that by reason of the resumption of normal marital relations between the parties each act of cruelty alleged by the husband was condoned, but it was revived by each subsequent act of cruelty. The whole conduct of cruelty was revived by the wife's desertion on 17th June, 1960, but there was condonation of cruelty by the acts of sexual intercourse during the period February 1962 to February 1963.

The only question which now remains to be decided is whether by the wife's refusal by her letter of 13th March, 1963 to resume cohabitation there was a revival of cruelty. On this point *Rayden on Divorce,* 8th Edition, at page 238 says:—

> "The reinstatement and forgiveness of a guilty spouse is subject to a condition implied by law that he or she shall commit no further matrimonial offence. If, therefore, a further matrimonial offence is committed, the condonation is cancelled and the old cause of complaint is revived. Such an offence need not necessarily be *ejusdem generis* as the original offence; nor need the subsequent offence be one entitling the wronged spouse to relief."

In *Beard* v. *Beard* [5] it was held that the wife's adultery which had been condoned was revived by her desertion although it had then continued for only about a year. Scott L.J. said in that case at page 22:—

> "The trend of judicial decision from 1730 onwards till the present year has been to uphold the rule that the

bar of condonation continues only so long as the matrimonial conduct of the repentant spouse continues to be such as the Divorce Court can accept as consistent with matrimonial duty, and that when a fresh matrimonial wrong is done the condonation ceases to confer protection and the right of the other spouse to proceed in the Divorce Court revives. In my opinion any other rule of law would not only be socially intolerable, but inconsistent with the real principle underlying the long line of cases and expressly mentioned in several of them though in slightly varying language, namely, that there must be no substantial digression from the path to which their marriage vows have bound the parties, of what is sometimes called in old but telling words 'conjugal kindness.' A 'matrimonial' or 'marital' offence within the cognizance 'of the Divorce Court' in my opinion simply means conduct which in the eye of that court is wrong, whether it does or does not reach the duration, or gravity, or completeness which is necessary to permit of a decree, provided always that it be sufficiently serious for the court to regard it as a substantial breach of duty."

Similarly, cruelty which has been condoned may be revived as a matrimonial offence by subsequent desertion and for this purpose desertion for three years need not be established. *Beard* v. *Beard* was applied in *Kafton* v. *Kafton* [6] in which Tucker L.J. said:—

"It has been decided by this court in *Beard* v. *Beard* that to revive a previous matrimonial offence which has been condoned it is not necessary to establish desertion for the full period of 3 years, but that desertion for a shorter period will suffice. *Beard* v. *Beard* dealt with the revival of condoned adultery and counsel for the husband formally took the point that it was wrongly decided so that he might argue the point elsewhere. I think it is clear that no distinction can be drawn between the present case and *Beard* v. *Beard*, and that the reasoning of the judges in that case applies equally to a case of cruelty as to a case of adultery."

Thus, the wife's cruelty was revived by her continued desertion after 13th March, 1963.

In the result I will make a *decree nisi* on the husband's petition on grounds of cruelty and desertion, such *decree nisi* to be made absolute in three months. I will hear arguments on the question of costs.

Decree nisi made.

Solicitors: *Lovelace & Hastings*; *Jayadeva, Zahir & Ismi.*

AUGUSTINE v. COMMISSIONER OF POLICE, MALAYA

[O.C.J. (Ong J.) July 8, 1964]

[K.L. — Originating Motion No. 7 of 1964]

Administrative Law — Suspension of officer from exercise of his office — Whether judicial or administrative act — Disciplinary proceedings — Foreign conviction — Public Officers (Conduct and Discipline) Regulations, 1956, regs. 38, 40 and 43 — Police Force Ordinance, 1952, s. 52.

Certiorari — Whether lies in respect of administrative act.

This was an application for an order of *certiorari* to remove for the purpose of being quashed an order of the commissioner of police suspending the applicant from the exercise of his office of assistant superintendent of police. The facts were that the applicant was travelling from Thailand to Alor Star, when his car was stopped and opium found in it. The applicant was convicted by a court in Thailand. The applicant was subsequently informed that disciplinary proceedings were contemplated against him and he was suspended from duty with effect from the date of his conviction. The applicant was informed that disciplinary proceedings were contemplated by reason of his conviction, but subsequently following objection by his counsel he was informed of an additional charge alleging that he had conducted himself in such a way as was considered prejudicial against the good name and integrity of the Royal Federation of Malaya Police and the Federation as a whole. A committee was appointed to investigate the charge against the applicant and he was informed that he would be notified of the time, date and place of the sitting of the committee.

Held: (1) the act of the commissioner of police in this case in suspending or interdicting the applicant was an administrative act and therefore *certiorari* did not lie;

(2) although the foreign conviction could not give the commissioner of police jurisdiction to exercise any of his powers under regulation 43 of the Public Officers (Conduct and Discipline) Regulation, 1956, in this case there was the additional charge of misconduct under regulation 38 of the Regulations and therefore the order of the commissioner of police in suspending the applicant was not invalid.

Case referred to:—

(1) *R.* v. *Metropolitan Police Commissioner, ex parte Parker* [1953] 2 All E.R. 717 at p. 721.

The following cases were also referred to in argument:—

Dunn v. *R.* [1896] 1 Q.B. 116 at p. 119, Lord Esher, Lord Herschell; *Gould* v. *Stuart* [1896] A.C. 575, P.C.; *Shenton* v. *Smith* [1895] A.C. 229; *Rederiakticblolaget Amphitrite* v. *R.* [1921] 3 K.B. 500 Rowlett, J.; *Oswald Hugh Pedro* v. *State of Hyderabad* A.I.R. 1953 Hyd. 98; *Mohamed Hussein* v. *State of Hyderabad* A.I.R. 1953 Hyd. 298; *Krishnamoorthy* v. *State of Madras* A.I.R. 1951 Mad. 888; *Province of Bombay* v. *K. S. Advani* A.I.R. 1950 S.C. 221; *Yusof Ali Khan* v. *Province of Punjab* A.I.R. 1950 Lahore 59; *I.M. Lall* v. *High Commissioner for India* A.I.R. 1948 P.C. 121; *Venkata Rao* v. *Secretary of State* A.I.R. 1937 P.C. 31; *Rangchari* v. *Secretary of State* A.I.R. 1937 P.C. 27; *Lilawata* A.I.R. 1952 Madhya Bharat 105; *Kewal Mal Singh* v. *Heta Ram* A.I.R. 1952 Rajasthan 17; *Gian Singh* v. *The Bank of China Ltd.* [1948] M.L.J. 86; *In re Application by Loke Wan Tho* [1956] M.L.J. 149; *Choo Yin Loo & Ors.* v. *Registrar of Societies* [1957] M.L.J. 228; *Munusamy* v. *P.S.C.* [1960] M.L.J. 220; *Terrell* v. *S.S. Colonies* [1953] 2 Q.B. 482; *Lucas* v. *Lucas & H.C. for India* [1943] 2 All E.R. 110; *King* v. *Dunsheath* [1950] 2 All E.R. 741; *Melayu Raya Press* v. *Colonial Secretary* [1951] M.L.J. 89; and *Cox* v. *The Army Council* [1962] 1 All E.R. 880.

ORIGINATING MOTION.

N. Ramachandran for the applicant.

Salleh bin Abbas (Federal Counsel) for the respondent.

Ong J.: This was an application for an order of *certiorari* to remove into this court for the purpose of being quashed an order of the Commissioner of the Royal Malayan Police suspending the applicant from the exercise of his